U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

Date: NOVEMBER 29, 1990
Case No.: 89-INA-118

In the Matter of:

GORCHEV & GORCHEV GRAPHIC DESIGN
Employer

on behalf of

SUSANA HEY QUALITZ
Alien

Appearance: Roy Watson, Jr., Esquire
For the Employer

BEFORE: Brenner, Glennon, Groner, Guill, Lipson, Litt, Romano, Silverman, and Williams
Administrative Law Judges

LAWRENCE BRENNER
Administrative Law Judge

DECISION AND ORDER

On February 22, 1990, a three-member panel presiding in this matter issued its decision affirming the Certifying Officer's (C.O.) denial of alien labor certification to fill the position of Art Director. The Employer's petition for review by the full Board was thereafter granted. By this Decision and Order, the Board hereby affirms the previous decision and denies the Employer's Request for Oral Argument.

In making the previous determination, the panel considered all of the expert opinions offered by the Employer concerning applicant English's qualifications. Of the two which do mention applicant English, neither provides the basis upon which the expert concluded that English lacked the special requirements of experience in photo art direction and special effects design (AF 14-15,21). Dr. Purvis' letter broadly and vaguely states that four named applicants, including Mr. English, are "clearly unqualified" for the job (AF 21). At best, Mr. Grear's opinion letter merely contains the unsupported conclusion that English lacks experience in photo art direction (AF 14).

While the Board accepts the proffered expertise of Mr. Grear and Dr. Purvis as authorities in the fields of graphic design and art direction, their opinions are based only upon a resume.

Indeed, Mr. Grear's letter emphasizes that he has no first-hand knowledge of the U.S. applicants' abilities, but is basing his judgment on their resumes (AF 15).

In this case, the panel found that applicant English's resume indicated that he met the broad range of experience, education, and training required for the job, thus raising the reasonable prospect that he met all of the Employer's stated actual requirements. Under these circumstances, the Employer had a duty to make a further inquiry, by interview or other means, into whether English met all of the actual requirements. Actual contact of English by the Employer, followed, if necessary, by verification with references, would have conclusively revealed whether or not he possessed the experience required in the specified areas.

In reaching its conclusion, the panel expressly followed a guideline stated in Nancy, Ltd., 88-INA-358 (April 27, 1989) (en banc), rev. Nancy, Ltd. v. Dole, Case No. 89-2257-CIV-Scott (S.D. Fla. August 8, 1990). Although that decision was reversed by the United States District Court of the Southern District of Florida, the Court did not address the validity of the policy guideline stated by the Board in Nancy. Rather, the Court concluded that certain material findings of fact were internally inconsistent in the Nancy decision and, accordingly, that denial of certification should be reversed.

We have reexamined the policy guideline stated in the Nancy case, and conclude that it should be reaffirmed here. That guideline, in sum, requires that an Employer follow-up on a promising, potentially qualified application for employment.

When an applicant's resume is silent on whether he or she meets a "major" requirement such as a college degree, an employer might reasonably assume that the applicant does not and, therefore, rejection without follow up may be proper. In the case of a subsidiary requirement with detailed specifications -- something a candidate might not indicate explicitly on his resume though he possesses it -- an employer carries the obligation under Nancy to inquire further whether the applicant meets all the detailed specifications.

An earlier Board decision held that an employer has no duty of further inquiry (unless the C.O. so directed) where the resume does not affirmatively show that the applicant meets the minimum job requirements. Anonymous Management, 87-INA-672 (Sept. 8, 1988) (en banc). To the extent that Anonymous Management would shift the burden from the employer to the U.S. applicant or the C.O., and would be contrary to application of the guideline set forth in this case, it will not be followed.

While experts in the field may know that photo art direction and special effects design experience are such major requirements that any qualified U.S. applicant would include them expressly in a resume, the Board does not know this and the Employer has not established this. The burden is on the Employer to establish that the resume alone shows there is no reasonable possibility that an applicant meets the job requirements.

Consistent with the Board's decision in Nancy, we hold that the context of the resume may also affect the reasonableness of an employer's assumption that an applicant does not meet a

requirement on which the resume is silent or unclear. Where, as here, the resume shows such a comprehensive range of the experience, education and training required for the job, an employer's failure to inquire further into whether the applicant meets a specific job requirement is harder to justify.

The record contains a scorecard prepared by the Employer reflecting its assessment of each U.S. candidate matched with each of its 11 requirements (AF 16). We note that none of the six applicants the Employer did offer to interview possessed both the requirements of experience in photo art direction and special effects design upon which applicant English was rejected without contact. In fact, two of those six applicants did not show that they had experience in either of the two requirements in question (AF 16). Such omissions support our conclusion that the Employer has not established that these specific requirements are so major that a qualified applicant would necessarily include them in a resume. Moreover, the Employer offered interviews to four candidates who did not even possess the required Bachelor's degree in Fine Arts. Accordingly, this unexplained act gives rise to a reasonable inference that the Employer engaged in an unlawful rejection of applicant English, who, by the Employer's own estimate on this scorecard, met more of the specified requirements than any other U.S. candidate.

Finally, the Board notes that the C.O.'s Final Determination (AF 6) as well as the second Notice of Findings (AF 47) preserve the issue that, contrary to 20 C.F.R. 656.21(b)(7), the Employer did not document that its rejection of specified U.S. workers was for lawful, job-related reasons.

ORDER

The Final Determination of the Certifying Officer denying labor certification is hereby AFFIRMED.

For the Board:

LAWRENCE BRENNER
Administrative Law Judge

LB/gaf

In re Gorchev & Gorchev Graphic Design, 89-INA-118

J. Romano, Dissenting

But for the due process consideration noted below, I would affirm the panel simply on the basis that the Employer-offered expert opinions, while competent as evidence on the ultimate factual question whether the U. S. applicant is qualified for the job offered, are neither relevant to nor offered for the purpose of addressing, the proximate legal question whether Employer has satisfied his burden of further inquiry under Nancy Ltd., 88-INA-358 (4/27/89) en banc. This latter question is one within the exclusive province of the Board.

As presented, however, I would reverse and grant certification since the Nancy Ltd. issue was not a basis for denial (see F.D. at AF 38). The C.O. denied certification only because the alien gained the required experience while in Employer's employ (see Delitizer Corp., 88-INA-482, 5/9/90, en banc), and because U. S. applicants were rejected for lack of qualifications not specified in the advertisements (see American Export Trading Co., 88-INA-220, 6/15/90, en banc). Moreover, Employer was never advised (in either of the NOFs) that further investigation of English's qualifications was required.

Both the panel and the Board en banc thus deny certification for a reason other than either of those contained in the F.D., and one never presented to Employer as its opportunity to cure the perceived defective recruitment of U.S. workers. This, in my judgment, goes well beyond the Board's scope of review, and effectively denies Employer due process of law.